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8 IN RE SOLAR CITY CORPORATION
9 SECURITIES LITIGATION

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11 Case No. 16-CV-04686-LHK

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13 **ORDER RE: MOTIONS FOR**
14 **APPOINTMENT OF LEAD PLAINTIFF**
15 **AND APPROVAL OF COUNSEL**

16
17 Re: Dkt. Nos. 10, 14, 18, 40

18 There are three motions pending before this Court in two consolidated cases. The first is
19 Richard Flynn (“Flynn”) and Neil Jubitz’s (“Jubitz”) Motion for Consolidation, Appointment as
20 Lead Plaintiff, and Approval of Counsel. ECF No. 10 (“Flynn & Jubitz Mot.”). The second is
21 Retail Wholesale Department Store Union Local 338 Retirement Fund’s (“Local 338’s”) Motion
22 for Consolidation of Related Cases, Appointment as Lead Plaintiff, and Approval of Counsel.
23 ECF No. 14 (“Local 338 Mot.”). The third is Frank Fish’s (“Fish”) Motion for Consolidation, and
24 Appointment as Lead Plaintiff, and Approval of Counsel. ECF No. 18 (“Fish Mot.”). Also before
25 the Court is Fish and Local 338’s Stipulation Appointing Fish and Local 338 as Co-Lead
26 Plaintiff’s. ECF No. 40 (Fish and Local 338 Stipulation).

27 After considering the parties’ briefing, the relevant law, and the record in this case, the

1 Court DENIES as moot the three motions to consolidate, GRANTS Fish's motion for appointment
2 as lead plaintiff and approval of counsel, and DENIES Flynn and Jubitz's and Local 338's
3 motions for appointment as lead plaintiff and approval of counsel. The Court DENIES Fish and
4 Local 338's stipulation appointing Fish and Local 338 as co-lead plaintiffs.

5 **I. BACKGROUND**

6 **A. Factual Background**

7 Defendant SolarCity Corporation ("SolarCity") "provides solar energy systems for
8 commercial and residential use." ECF No. 1 ("Compl.") ¶ 2. SolarCity sells and leases solar
9 energy systems directly to customers. *Id.* The other Defendants—Lyndon Rive, Brad Buss, and
10 Tanquy Serra—were officers of SolarCity during the events alleged in the complaint. *Id.* The
11 Court refers to SolarCity and its officers collectively as Defendants.

12 The instant suit is a securities class action brought "on behalf of persons and entities that
13 acquired SolarCity securities between May 5, 2015, and February 9, 2016, inclusive (the 'Class
14 Period')." *Id.* ¶ 1. Plaintiffs allege that Defendants violated the Securities Exchange Act of 1934
15 through statements made in quarterly letters to investors. *Id.*

16 Specifically, on May 5, 2015, the first day of the Class Period, SolarCity issued the
17 "SolarCity First Quarter 2015 Shareholder Letter." *Id.* ¶ 21. This letter reported financial
18 information and sales numbers for the first quarter of 2015, and made predictions about sales in
19 the second quarter of 2015. *Id.* On July 29, 2015, SolarCity issued the "SolarCity Second Quarter
20 2015 Shareholder Letter." *Id.* ¶ 22. That letter reported financial information and sales numbers
21 for the second quarter of 2015, made predictions about sales in the third quarter of 2015, and
22 stated that SolarCity predicted a strong close to 2015 and "solid growth" in 2016. *Id.*

23 On October 29, 2015, SolarCity issued the "SolarCity Third Quarter 2015 Shareholder
24 Letter." *Id.* ¶ 26. That letter announced that SolarCity "was lowering its full year 2015 guidance."
25 *Id.* ¶ 3. Specifically, SolarCity stated that it was "estimating installations of 280 to 300 MW in the
26 fourth quarter This is below the low end of our prior annual guidance . . ." *Id.* Additionally,
27 SolarCity announced it was lowering its target growth rate for the 2016 fiscal year from 70%

1 down to 41%. *Id.* As a result, at the close of October 30, 2015, SolarCity's stock price fell \$8.42
2 per share, or 22%, to \$29.65 per share. *Id.*

3 The complaint alleges that the May 5, 2015 letter, the July 29, 2015 letter, and the October
4 29, 2015 letter all contain statements that "were materially false and/or misleading, as well as
5 failed to disclose material adverse facts about [SolarCity's] business, operations, and prospects."
6 *Id.* at 25, 29. Specifically, these letters allegedly stated falsely or failed to disclose "(1) that
7 demand for [SolarCity's] products was weakening; (2) that [SolarCity] was concealing the
8 weakening demand from investors; and (3) that, as a result of the foregoing, Defendants'
9 statements about SolarCity's business, operations, and prospects, were false and misleading and/or
10 lacked a reasonable basis." *Id.* at 25, 29.

11 On February 9, 2016, the last day of the Class Period, SolarCity issued the "SolarCity
12 Fourth Quarter 2015 Shareholder Letter." *Id.* ¶ 30. In that letter, SolarCity announced that "it fell
13 short of its previously issued fiscal year 2015 installation guidance." *Id.* ¶ 5.

14 On February 10, 2016, SolarCity filed its annual report to the Securities and Exchange
15 Commission ("SEC") on Form 10-K (the "10-K"). *Id.* ¶ 31. SolarCity's 10-K affirmed the
16 information reported in the February 9, 2016 letter to shareholders. *Id.* The 10-K also reported
17 that SolarCity would no longer report "nominal contracted payments," which are characterized as
18 an "undeployed backlog of contracts," as a representation of SolarCity's growth. *Id.* In addition,
19 the 10-K "reported cumulative energy contracts[,] quarter-to-quarter growth[,] and cumulative
20 customer quarter-to-quarter growth that fell below [SolarCity's] recent trend." *Id.* As a result of
21 the February 9, 2016 and February 10, 2016 disclosures, at the close of February 10, 2016,
22 SolarCity's stock price fell \$7.72 per share, or 29%, to \$18.63 per share. *Id.* ¶ 31.

23 **B. Procedural History**

24 On August 15, 2016, Plaintiff Joerg Muller filed the instant class action suit, which was
25 titled *Mueller v. SolarCity Corp., et al.*, Case No. 5:16-CV-04686-LHK. On the same day, August
26 15, 2016, a notice was published in *Business Wire* that the suit had been filed as required by 15
27 U.S.C. § 78u-4(a)(3)(A)(i). ECF No. 15 & 15-1, Declaration of Robert Prongay ("Prongay

1 Decl.”) ¶ 2 & Ex. A. This notice advised putative class members that they had 60 days from the
2 date of the notice, until October 14, 2016, to file a motion to seek appointment as lead plaintiff in
3 the lawsuit. *Id.* On October 7, 2016, Plaintiff George Nuckols filed a suit that made similar class
4 action allegations as *Mueller* in a case titled *Nuckols v. SolarCity Corp., et al.*, Case No. 5:16-CV-
5 05806-LHK.

6 On October 14, 2016, in the *Mueller* case, putative class members filed the instant three
7 motions. Flynn and Jubitz, Local 338, and Fish each filed a Motion for Consolidation,
8 Appointment as Lead Plaintiff, and Approval of Counsel. Flynn & Jubitz Mot. at 1; Local 338
9 Mot. at 1; Fish Mot. at 1. These motions sought to consolidate *Mueller* and *Nuckols* and to
10 appoint each respective movant as lead plaintiff in the consolidated cases. On October 28, 2016,
11 Local 338 and Fish filed oppositions to each other’s motions and Flynn and Jubitz’s motion for
12 appointment as lead plaintiff. ECF No. 24 (“Fish Opp’n”); ECF No. 25 (“Local 338 Opp’n”). On
13 November 4, 2016, Local 338 and Fish filed replies. ECF No. 31 (“Local 338 Reply”); ECF No.
14 32 (“Fish Opp’n”).

15 On November 4, 2016, the Court granted the parties’ stipulation to consolidate *Mueller* and
16 *Nuckols*. ECF No. 29. *Mueller* and *Nuckols* were consolidated and re-captioned as *In re Solar*
17 *City Corporation Securities Litigation*, Case No. 5:16-CV-04686-LHK.

18 On January 19, 2017, Local 338 and Fish filed a stipulation appointing Fish and Local 338
19 as co-lead Plaintiffs. ECF No. 40. Neither Flynn and Jubitz nor Defendant were party to the
20 stipulation.

21 **II. DISCUSSION**

22 The instant three motions seek to consolidate *Mueller* and *Nuckols*, appoint each movant as
23 lead plaintiff, and approve the lead plaintiff’s choice of counsel.

24 On November 4, 2016, the Court granted the parties’ stipulation to consolidate *Mueller* and
25 *Nuckols*. ECF No. 29. Accordingly, the Court DENIES as moot all three motions to consolidate.

26 The Court next turns to the motions to appoint lead plaintiff and approve class counsel.
27 The Court first discusses the requirements for selecting lead plaintiff’s counsel and approving

1 counsel in securities class actions, and then discusses which movant has satisfied those
2 requirements in this case.

3 **A. PSLRA Selection of Lead Plaintiff's Counsel**

4 The Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4, governs the
5 selection of a lead plaintiff in private securities class actions. This plaintiff should be the "most
6 capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B)(i).
7 Under the PSLRA, a three-step process determines the lead plaintiff. *In re Cavanaugh*, 306 F.3d
8 726, 729 (9th Cir. 2002). First, the first plaintiff to file an action governed by the PSLRA must
9 publicize the pendency of the action, the claims made, and the purported class period "in a widely
10 circulated national business-oriented publication or wire service." 15 U.S.C. § 78u-
11 4(a)(3)(A)(i)(I).¹ This notice must also alert the public that "any member of the purported class
12 may move the court to serve as lead plaintiff." 15 U.S.C. § 78u-4(a)(3)(A)(i)(II).²

13 Second, the court must select the presumptive lead plaintiff. *See In re Cavanaugh*, 306
14 F.3d at 729-30 (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)). In order to determine the presumptive
15 lead plaintiff, "the district court must compare the financial stakes of the various plaintiffs and
16 determine which one has the most to gain from the lawsuit." *Id.* at 730 (footnote omitted). Once
17 the court identifies the plaintiff with the most to gain, the court must determine whether that
18 plaintiff, based on the information he provides, "satisfies the requirements of Rule 23(a), in
19 particular those of 'typicality' and 'adequacy.'" *Id.* If he does, that plaintiff becomes the
20 presumptive lead plaintiff. *Id.* If not, the court selects the plaintiff with the next-largest financial
21 stake and determines whether that plaintiff satisfies the requirements of Rule 23. *Id.* The court
22 repeats this process until it selects a presumptive lead plaintiff. *Id.*

23 Third, those plaintiffs not selected as the presumptive lead plaintiff may "rebut the
24 presumptive lead plaintiff's showing that it satisfies Rule 23's typicality and adequacy

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26 ¹ This publication is to be made "[n]o later than 20 days after the date on which the complaint is
27 filed." 15 U.S.C. § 78u-4(a)(3)(A)(i).

² Those who wish to move the court for appointment as lead plaintiff must do so "not later than 60
28 days after the date on which the notice is published." 15 U.S.C. § 78u-4(a)(3)(A)(i)(II).

1 requirements.” *Id.* (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)). This is done by showing that the
2 presumptive lead plaintiff either “will not fairly and adequately protect the interests of the class”
3 or “is subject to unique defenses that render such plaintiff incapable of adequately representing the
4 class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa)-(bb). If the court determines that the presumptive
5 lead plaintiff does not meet the typicality or adequacy requirement, then it must return to step two,
6 select a new presumptive lead plaintiff, and again allow the other plaintiffs to rebut the new
7 presumptive lead plaintiff’s showing. *In re Cavanaugh*, 306 F.3d at 731. The court repeats this
8 process “until all challenges have been exhausted.” *Id.* (citation and footnote omitted).

9 Under the PLSRA, the lead plaintiff is given the right, subject to court approval, to “select
10 and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). “[T]he district court
11 should not reject a lead plaintiff’s proposed counsel merely because it would have chosen
12 differently.” *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 711 (9th Cir. 2009) (citation omitted). “[I]f
13 the lead plaintiff has made a reasonable choice of counsel, the district court should generally defer
14 to that choice.” *Id.* at 712 (citations omitted).

15 **B. Analysis**

16 The Court first discusses the procedural requirements of the PSLRA, then addresses who is
17 the presumptive lead plaintiff and any rebuttal arguments against that presumptive lead plaintiff,
18 and finally discusses the lead plaintiff’s choice of counsel.

19 **1. Procedural Requirements**

20 On August 15, 2016, the first of the two consolidated securities class actions, *Mueller v.*
21 *SolarCity Corp., et al.*, Case No. 5:16-CV-04686-LHK, was filed in this District asserting claims
22 under the Securities Exchange Act against Defendants. On the same day, August 15, 2016, a
23 notice was published in *Business Wire* pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(i). Prongay Decl.
24 ¶ 2 & Ex. A. This notice was timely because it was published within 20 days after the filing of the
25 complaint, and it listed the claims, the class period, and advised putative class members that they
26 had 60 days from the date of the notice to file a motion to seek appointment as lead plaintiff in the
27 lawsuit. *See* 15 U.S.C. § 78u-4(a)(3)(A). The three motions to appoint a lead plaintiff were filed
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1 on October 14, 2016, within 60 days of the notice published in *Business Wire*, as required by 15
2 U.S.C. § 78u-4(a)(3)(A). The parties seeking to become lead plaintiff, therefore, have met the
3 statutory procedural requirements.

4 **2. Presumptive Lead Plaintiff**

5 **a. Largest Financial Interest**

6 The PSLRA provides that, after notice of the class action has been given, a “court shall
7 consider any motion made by a purported class member in response to the notice . . . and shall
8 appoint as lead plaintiff the member or members of the purported plaintiff class that the court
9 determines to be most capable of adequately representing the interest of class members.” 15
10 U.S.C. § 78u-4(a)(3)(B)(i). The most capable plaintiff is generally the one who has the greatest
11 financial stake in the outcome of the case, so long as he or she meets the requirements of Rule 23.
12 *In re Cavanaugh*, 306 F.3d at 729. District courts have “equate[d] financial interest with actual
13 economic losses suffered.” *Perlmutter v. Intuitive Surgical, Inc.*, 2011 WL 566814, at *3 (N.D.
14 Cal. 2011); *see also Richardson v. TVIA, Inc.*, 2007 WL 1129344, at *4 (N.D. Cal. Apr. 16, 2007)
15 (looking primarily to the movants’ approximate losses suffered in identifying the plaintiff with the
16 largest financial interest).

17 Here, Fish has the largest financial interest in the litigation. Fish provides evidence that he
18 suffered losses of \$1,563,260.03 as a result of Defendants’ conduct. *See* ECF No. 18-1, First
19 Declaration of Willem F. Jonckheer (“First Jonckheer Decl.”) Ex. C. In a response, Local 338 has
20 pointed to errors in the stock prices provided by Plaintiff on the days in question, and, as a result,
21 Fish has modified his estimated losses to \$1,779,637.50. ECF No. 32-1, Second Declaration of
22 Willem F. Jonckheer (“Second Jonckheer Decl.”) Ex. C.

23 The other plaintiffs have lower asserted financial interests. Local 338 asserts that it
24 suffered a loss of \$539,153.05. Prongay Decl. Ex. C. Flynn and Jubitz assert that they have
25 suffered a loss of \$141,597. ECF No. 11, Declaration of Jennifer Pafiti (“Pafiti Decl.”) Ex. C. As
26 mentioned above, Local 338 has asserted that Fish’s calculations are questionable given that his
27 original submission included incorrect stock prices. However, the values before and after Fish’s

1 revision are both higher than the amounts asserted by Local 338 and Flynn and Jubitz. Therefore,
2 the Court finds that Fish is the movant with the greatest financial interest in the litigation.

3 **b. Rule 23 Requirements**

4 The Court next turns to whether Fish satisfies the requirements of Rule 23(a). *See In re*
5 *Cavanaugh*, 306 F.3d at 732 (“Once it determines which plaintiff has the biggest stake, the court
6 must appoint that plaintiff as lead, unless it finds that he does not satisfy the typicality or adequacy
7 requirements.”). This showing need not be as thorough as what would be required on a class
8 certification motion and only needs to satisfy typicality and adequacy. *See Zhu v. UCBH*
9 *Holdings, Inc.*, 682 F. Supp. 2d 1049, 1053 (N.D. Cal. 2010) (“Although the inquiry at this stage
10 of the litigation is not as searching as the one triggered by a motion for class certification, the
11 proposed lead plaintiff must make at least a preliminary showing that it meets the typicality and
12 adequacy factor.”). The Court first addresses typicality and then addresses adequacy.

13 In determining whether typicality is satisfied, a court inquires “whether other members
14 have the same or similar injury, whether the action is based on conduct which is not unique to the
15 named plaintiffs, and whether other class members have been injured by the same course of
16 conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation and
17 quotation marks omitted); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) (citations
18 omitted) (holding that typicality is satisfied “when each class member’s claim arises from the
19 same course of events, and each class member makes similar legal arguments to prove the
20 defendants’ liability”). This requirement is “permissive” and requires only that the
21 representative’s claims are “reasonably co-extensive with those of the absent class members; they
22 need not be substantially identical.” *Hanlon*, 150 F.3d at 1020. “The purpose of the typicality
23 requirement is to assure that the interest of the named representative aligns with the interests of the
24 class.” *Hanon*, 976 F.2d at 508.

25 Here, like other members of the purported class, Fish purchased SolarCity securities during
26 the Class Period allegedly in reliance on Defendants’ false and misleading statements, and
27 suffered damages as a result. Thus, because Fish’s claims are premised on the same legal and

remedial theories and are based on the same types of alleged misrepresentations and omissions as the class's claims, Fish's claims are typical of the claims of other members of the putative class. *See Fish Mot. at 6; City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 2013 WL 2368059, at *4 (N.D. Cal. May 29, 2013) (finding typicality requirement met when proposed lead plaintiff "purchased [the defendant's] common stock during the Class Period, allegedly in reliance upon [the d]efendants' purported false and misleading statements, and alleged[ly] suffered damages as a result").

The Court next addresses Fish's adequacy. In the Ninth Circuit, to test the adequacy of a class representative, a court must answer two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citing *Hanlon*, 150 F.3d at 1020).

Here, there is no indication of conflicts between Fish and other class members. *See Fish Mot. at 9.* Further, Fish has a significant stake in the outcome of the instant action such that the Court is confident he will vigorously prosecute the claims. *See Miami Police Relief & Pension Fund v. Fusion-io, Inc.*, 2014 WL 2604991, at *5 (N.D. Cal. June 10, 2014) (appointing lead plaintiff in a securities class action where there was no evidence of conflicts and the presumptive lead plaintiff had a large stake in the litigation). Fish has submitted a sworn certification that he is “willing to serve as a representative party on behalf of the class in this action,” and that he “fully understand[s] the duties and responsibilities of the lead plaintiff under the [PSLRA].” First Jonckheer Decl. Ex. A ¶ 3. Moreover, Fish has submitted evidence that he has hired counsel with experience in the prosecution of securities class actions. *See First Jonckheer Decl. Ex. D; Philips v. Ford Motor Co.*, 2016 WL 7428810, at *12 (N.D. Cal. Dec. 22, 2016) (finding adequacy at class action certification partly because “Plaintiffs’ counsel has experience in prosecuting consumer protection actions involving claims similar to those in the instant case.”). Accordingly, the Court finds that, for purposes of the appointment of lead plaintiff, Fish has made a showing that he meets the adequacy requirement of Rule 23.

c. Rebuttal of Presumptive Lead Plaintiff

Having established that Fish has the greatest financial stake and satisfies the requirements of Rule 23(a), Fish is presumptively the most adequate plaintiff to represent the class. This presumption may be rebutted only upon proof by a member of the purported plaintiff class that Fish either (1) “will not fairly and adequately protect the interests of the class,” or (2) “is subject to unique defenses that render [it] incapable of adequately representing the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). Absent proof that the lead plaintiff candidate with the largest financial interest does not satisfy the requirements of Rule 23, said candidate is “entitled to lead plaintiff status.” *In re Cavannaugh*, 306 F.3d at 732.

In response to Fish’s motion, Local 338 argues that Fish will not be an adequate or typical lead plaintiff because the losses Fish claims in his motion were inaccurate. Specifically, Local 338 notes that some of the stock prices used to calculate the total amount purchased and sold were higher than the maximum or lower than the minimum SolarCity stock price on the day of the purchase or sale of the stock. Local 338 Opp’n at 3. In response, Fish acknowledges that the declaration was inaccurate, and explains that the error was due to a “transposing error” that occurred when the stock prices were migrated “from Mr. Fish’s online brokerage account.” Fish Reply at 1–2. After correcting the error, Fish’s claimed financial losses increased from \$1,563,260.03 to \$1,779,637.50. *Compare* First Jonckheer Decl. Ex C, *with* Second Jonchheer Decl. Exs. B, C.

While the Court finds the error in Fish’s claimed damages to be troubling, those errors do not rebut the presumption that Fish is lead plaintiff. Multiple district courts have held that “minor or inadvertent mistakes made in a sworn certification do not strike at the heart of Rule 23’s adequacy requirement.” *Niederklein v. PCS Edventures!.com, Inc.*, 2011 WL 759553, at *11 (D. Idaho Feb. 24, 2011); *Tai Jan Bao v. SolarCity Corp.*, 2014 WL 3945879, at *4 (N.D. Cal. Aug. 11, 2014) (finding presumptive lead plaintiff adequate and typical despite error in claimed losses); *In re Advanced Tissue Sciences Sec. Litig.*, 184 F.R.D. 346, 351 n.12 (S.D. Cal. 1998) (“The Court . . . does not find the McKitty Group’s computational and typographical errors to be so

1 substantial as to overcome the statutory presumption in favor of the McKitty Group.”); *Chill v.*
2 *Green Tree Fin. Corp.*, 181 F.R.D. 398, 410–11 (D. Minn. 1998) (allowing plaintiff movant to
3 supplement certifications in order to correct technical deficiencies in original filing). A district
4 court in the Southern District of New York has noted that “[t]he failure to correct obvious or
5 inconsequential clerical errors . . . simply is not the type of adequacy issue that would ‘divert the
6 fact finders’ attention from the merits and thus infect the claims of the class as a whole.”” *Khunt*
7 *v. Alibaba Grp. Holding Ltd.*, 102 F. Supp. 3d 523, 538–39 (S.D.N.Y. 2015) (quoting *Dubin v.*
8 *Miller*, 132 F.R.D. 269, 272 (D. Colo. 1990)). Similarly here, the error made when transferring
9 stock prices from Plaintiff’s brokerage account to Fish’s motion was clearly an inadvertent error
10 that will not “infect the claims of the class as a whole.” *Id.*

11 Errors in claimed losses may render a movant inadequate if there is “evidence of bad faith
12 or intent to deceive the court or the parties.” *In re SLM Corp. Sec. Litig.*, 2012 WL 209095, at *8
13 (S.D.N.Y. Jan. 24, 2012). Here, there is no indication that Fish’s error was caused by anything but
14 an oversight. In fact, because Fish is seeking to become lead plaintiff—presumptively, the
15 plaintiff with the largest financial interest in the litigation—Fish would have benefited from
16 increasing the claimed amount rather than decreasing it, as occurred here. Thus, the Court finds it
17 unlikely that bad faith motivated Fish’s error.

18 Local 338 also argues that Fish’s errors could create “individualized defenses” that affect
19 the typicality and adequacy of Fish as lead plaintiff. However, Local 338 fails to identify and the
20 Court is unaware of any individualized defenses that are likely to arise from Fish’s error.

21 Finally, Local 338 argues that, as an institutional investor, Local 338 would be a better
22 lead plaintiff than Fish. However, “a district court’s belief that ‘another plaintiff may be ‘more
23 typical’ or ‘more adequate’ is of no consequence.”” *Khunt*, 102 F. Supp. 3d at 535 (quoting *In re*
24 *Cavanaugh*, 306 F.3d at 732). The Court’s review is limited to determining which movant has the
25 largest financial interest and determining whether that movant satisfies the Rule 23 requirements.

1 Here, Fish satisfies both requirements.³

2 Accordingly, Fish is entitled under the PSLRA to be the lead plaintiff in this securities
3 class action.

4 **3. Lead Plaintiff's Counsel**

5 The PSLRA provides that “[t]he most adequate plaintiff shall, subject to the approval of
6 the court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). The
7 decision of lead counsel belongs to the lead plaintiff. *In re Cavanaugh*, 306 F.3d at 734 n.14.
8 Fish has chosen the law firms of Schubert Jonckheer & Kolbe LLP and Newman Ferrara LLP.
9 The Court has reviewed the firms’ resume, *see* First Jonckheer Decl. Ex. D, and is satisfied that
10 the lead plaintiff has made a reasonable choice of counsel. Both Schubert Jonckheer & Kolbe
11 LLP and Newman Ferrara LLP have experience in the prosecution of securities class actions, and
12 it appears that those firms will adequately represent the interests of all class members.

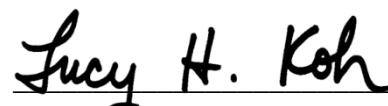
13 Accordingly, the Court defers to Fish’s choice in counsel.

14 **III. CONCLUSION**

15 The Court DENIES as moot Fish’s, Flynn and Jubitz’s, and Local 338’s motions to
16 consolidate. The Court GRANTS Fish’s motion to be appointed as lead plaintiff and for approval
17 of lead plaintiff’s counsel. The Court DENIES Local 338’s and Flynn and Jubitz’s motions to be
18 appointed as lead plaintiff and for approval of lead plaintiff’s counsel. The Court DENIES Fish
19 and Local 338’s stipulation for appointment of Fish and Local 338 as co-lead plaintiffs.

20 **IT IS SO ORDERED.**

22 Dated: January 25, 2017

23 
24 LUCY H. KOH
United States District Judge

25
26 ³ The Court also notes that Local 338 has stipulated to appointment of itself and Fish as co-lead
27 plaintiffs. This willingness to allow Fish to be one of the lead plaintiffs indicates that Local 338
28 does not strongly believe that Fish fails to satisfy typicality and adequacy.